BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TRISTA RAULS	)	
Claimant	)	
VS.	)	
	)	
PREFERRED RISK INSURANCE SERVICES	)	Docket Nos. 1,061,187
Respondent	)	& 1,061,188
AND	)	
	)	
HANOVER INSURANCE GROUP	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the November 27, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) William G. Belden. Roger D. Fincher of Topeka, Kansas, appeared for claimant. Lara Q. Plaisance of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and is listed in the November 27, 2012, Order. The record also includes all pleadings contained in the administrative file.

ISSUES

In Docket No. 1,061,187, claimant alleges she sustained back and bilateral leg injuries by repetitive trauma from February 28, 2012, through March 7, 2012, as the result of performing office work for respondent. Claimant asserts in Docket No. 1,061,188 that she reinjured her back and legs on April 26, 2012, when against medical advice, she returned to work too soon.

Respondent denied both claims, alleging that claimant did not provide timely notice in either claim. Respondent asserted claimant was not injured arising out of and in the course of her employment but, rather, was injured outside of work. Respondent next contended that if claimant sustained injuries by repetitive trauma or by accident, she failed to prove her work activities were the prevailing factor causing her injuries and current need

for medical care. Finally, respondent argues that claimant's injuries are an aggravation of a preexisting condition.

In Docket No. 1,061,187, ALJ Belden found: (1) claimant's employment did not place her at increased risk of injury, (2) claimant failed to meet her burden of proving repetitive trauma was the prevailing factor in causing her alleged injury, and (3) claimant failed to give timely notice of the alleged personal injury by repetitive trauma. In Docket No. 1,061,188, ALJ Belden determined: (1) claimant failed to sustain her burden of proving she sustained a compensable injury from an alleged accident occurring on April 26 or 27, 2012; (2) that if an accident did occur on April 26 or 27, 2012, claimant failed to prove that it was the prevailing factor in causing her medical condition, disability or impairment; and (3) claimant failed to give timely notice of the accident.

The issues are:

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1. What is the date of claimant's alleged work-related injury by repetitive trauma?

2. Did claimant give timely notice of her alleged work-related injury by repetitive trauma?

3. If so, did claimant sustain an injury by repetitive trauma arising out of and in the course of her employment? Specifically, (a) were claimant's work activities the prevailing factor causing her injury by repetitive trauma and current need for medical treatment and (b) did claimant's injuries merely aggravate a preexisting condition?

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1. What is the date of claimant's alleged work-related accident?

2. Did claimant give timely notice of her alleged work-related injury by accident?

3. Did claimant sustain an accident arising out of and in the course of her employment? Specifically, (a) was claimant's alleged accident the prevailing factor causing her injury and current need for medical treatment and (b) did claimant's accident merely aggravate a preexisting condition?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

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Claimant asserts that she sustained back and bilateral leg injuries from repetitive trauma from February 28, 2012, through March 7, 2012. She filed her application for hearing on June 8, 2012. Claimant went to work for respondent on January 10 or 11, 2012. Claimant testified that she sorted mail, carried and lifted boxes full of mail to a credenza, answered 80 to 100 telephone calls per day, reached across a desk, and did a lot of bending and twisting. Claimant indicated she worked eight to ten hours a day, maybe more. Claimant testified she worked at an oversized desk. Because the telephone cord was not long enough, claimant would have to reach across the desk to answer the telephone. At her evidentiary deposition, claimant described her workload as medium to heavy.

Claimant testified that she developed low back problems in late February 2012. When asked if she notified respondent of her injuries, claimant testified:

> Q. (Ms. Plaisance) But did you ever go to Gary and say, I hurt myself at work and I would like to get some medical treatment?
>
> A. (Claimant) I never had time to.[1]

At her November 1, 2012, evidentiary deposition, claimant testified that she complained to her supervisor, Gary Randant, about her working environment. She asked for longer cords so that her computer keyboard and telephone would be closer. Claimant indicated she was offered the use of a headset that was broken. According to claimant, she complained more than five times to Mr. Randant about the problems with her desk. Claimant testified that during March 2012, she told Mr. Randant of having back pain from reaching over the desk to answer the telephone. However, claimant did not indicate to Mr. Randant the need to file a workers compensation claim. Claimant again testified she never had time to tell Mr. Randant of having a work-related injury.[2]

Claimant texted Mr. Randant several times from February 24 through May 4, 2012, about her back condition and medical treatment, but did not mention a work-related back injury.

Claimant testified that she primarily sought medical treatment for her back at the Olathe Medical Center emergency room. She alleges she told the doctors that the back pain was work related.

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[1] Claimant Depo. (Sept. 24, 2012) at 37.

[2] Claimant Depo. (Nov. 1, 2012) at 74-75.

Claimant received emergency room treatment for her back on March 7, 2012, at Olathe Medical Center. The notes from that emergency room visit indicated claimant had left lower back and buttock pain radiating down her leg. The notes also stated her onset of back pain was one week ago. No mention of a work-related injury was made in the Olathe Medical Center notes from claimant's March 7 and 18 visits.

Claimant was seen on February 29 and March 6 and 30, 2012, by Dr. Kevin J. Punswick for low back pain and psychiatric issues described as attention deficit disorder. Dr. Punswick's notes make no mention of a work injury. Dr. Punswick referred claimant to Dr. Charles M. Striebinger for low back surgery. Dr. Striebinger performed an emergency laminectomy on claimant at L4-5 on April 1, 2012, and took claimant off work.

On April 12, 2012, claimant signed a document entitled "Patient Information" where the section that asked if this was an auto accident or workers compensation injury was marked N/A. Claimant saw Dr. Striebinger on April 29, 2012, and complained of back pain, but denied a new injury. An April 29, 2012, lumbar MRI revealed a recurrent L4-5 herniated nucleus pulposus. Dr. Striebinger, on May 2, 2012, performed a left lumbar laminectomy at L4-5. Dr. Striebinger's records do not indicate claimant was diagnosed with a repetitive trauma injury.

At the request of her attorney, claimant was evaluated by orthopedic physician Dr. Glenn M. Amundson on July 18, 2012. He opined claimant sustained work-related back injuries on February 28 and April 26, 2012. On August 14, 2012, Dr. Amundson performed a decompression at L4-5 to alleviate pressure due to a recurrent disc herniation.

Claimant filed a claim with her health insurance company through Olathe Medical Center to pay for the treatment for her back. Her health insurance company denied payment and claimant was uncertain as to why.

Gary Randant, claimant's supervisor, was deposed on two occasions. He testified that on February 28, 2012, claimant complained of injuring her back while packing personal belongings at her home in order to move to an apartment. Mr. Randant indicated that after February 28, 2012, claimant appeared to have discomfort. On several occasions after that, claimant left early to see a chiropractor or doctor for her back issues. Mr. Randant testified that claimant never complained about her workstation causing back pain.

Mr. Randant testified that claimant last worked on April 27, 2012, and was discharged on May 2, 2012. Claimant was discharged because she was missing so much work and her position needed to be filled. Mr. Randant testified he was never notified by claimant of a work injury, during the time she worked for respondent. Mr. Randant averred that claimant stated her surgeon was of the opinion that claimant's chiropractor was responsible for claimant's back condition. Mr. Randant provided the name of an attorney, Michael Williams, to claimant for the purpose of exploring a malpractice claim against the chiropractor.

After learning the size of claimant's desk was allegedly the cause of her back issues, Mr. Randant measured the desk. He testified the desk was standard size and measured 30 inches from front to back and was 66½ inches wide.

Several of claimant's coworkers were deposed. Bernard Concannon, III; Danielle Tatzko and Chelsea McWhirk all testified that claimant told them of hurting her back at home while moving. Mr. Concannon and Ms. McWhirk signed affidavits stating claimant never told them of a work injury. Ms. McWhirk testified that claimant indicated she had back issues since her pregnancy nine years earlier. Mr. Concannon indicated that after seeing a chiropractor, claimant indicated the chiropractor made her back worse and she was going to sue the chiropractor. Ms. Tatzko indicated she first learned claimant was alleging a work injury when respondent received paperwork from claimant's attorney in June 2012.

Claimant's mother, Michelle Kuhn, testified that in January and February 2012, claimant complained of back pain. When asked if claimant told her what was causing the back pain, Ms. Kuhn testified, "We didn't know."[3] In an effort to relieve claimant's back pain, Ms. Kuhn bought claimant a new desk chair for use at home. Ms. Kuhn later testified that claimant said her desk chair at work did not fit her properly. The only time Ms. Kuhn spoke to Mr. Randant was on the telephone shortly before claimant's second surgery. Ms. Kuhn was not asked and did not indicate she ever notified respondent that claimant had sustained a work-related injury.

Both claimant and Ms. Kuhn testified that at least on two occasions, claimant needed assistance in leaving work. Ms. Kuhn indicated that the first incident occurred the Friday before claimant's first surgery and that Mr. Concannon assisted Ms. Kuhn in helping claimant leave the office. Mr. Concannon denied helping claimant leave the office. Ms. Kuhn was uncertain when the second incident took place.

At the request of respondent, claimant was evaluated by orthopedic physician Dr. Mark Bernhardt on October 5, 2012. He opined claimant's job activities were not the prevailing factor causing her injuries. He noted that one-half of all disc herniations occur without a specific injury and the other one-half occur with some specific event. Dr. Bernhardt then indicated claimant had no specific event. He also indicated claimant alleged she had no prior back pain issues before 2012, but her medical records indicated otherwise.

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Claimant filed her application for hearing on June 8, 2012, alleging a back injury on April 26, 2012, because she was forced to return to work before being released or she

[3] Kuhn Depo. at 12.

would lose her job. After her April 1, 2012, surgery, according to Mr. Randant, claimant returned to work on April 24, 2012. Claimant testified at her depositions that she was given an ultimatum to return to work by Mr. Randant. After claimant returned to work, she reinjured herself on April 26 or 27 when she stretched across her desk to answer the telephone. Claimant testified her surgeon would not release her to return to work, but claimant returned to work because she needed the job. Mr. Randant denies coercing or forcing claimant to return to work.

Claimant testified that on Friday, April 27, while in her automobile, she called Mr. Randant and asked him to come to the parking lot to talk. Claimant did so because her back was too painful to get out of the car. Claimant told Mr. Randant of needing to go to the emergency room but did not testify she told Mr. Randant of suffering another work-related back injury. On April 26, 2012, and April 27 at 3:57 p.m., claimant texted Mr. Randant, but did not mention having back issues. Mr. Randant testified he received a call on April 30, 2012, indicating claimant was back in the hospital.

PRINCIPLES OF LAW

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[4] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.[5]

K.S.A. 2011 Supp. 44-508(e) in part states:

> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
>
> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
>
> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or

[4] K.S.A. 2011 Supp. 44-501b(c).

[5] K.S.A. 2011 Supp. 44-508(h).

(4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.

In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-520 states:

(a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:

(A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;

(B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or

(C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.

Notice may be given orally or in writing.

(2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.

(3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.

(4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.

(b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.

(c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

ANALYSIS

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In order to determine if claimant gave timely notice of her alleged injuries by repetitive trauma, claimant's date of injury must be determined. K.S.A. 2011 Supp. 44-508(e) provides the earliest of four occurrences establishes a claimant's date of injury by repetitive trauma. The earliest of those occurrences in the present claim is April 27, 2012, claimant's last day of work. Therefore, this Board Member finds claimant's date of injury by repetitive trauma is April 27, 2012.

Claimant testified she complained her workstation was causing her back pain. Mr. Randant denied that assertion. Claimant testified she was too busy to tell Mr. Randant of a work injury. Several of claimant's coworkers testified they were told by claimant she hurt her back while moving. Not a single coworker testified they were told by claimant that she sustained a work-related injury. Claimant's texts to Mr. Randant do not mention a work injury. The medical records of Drs. Punswick and Striebinger do not mention a work injury. Claimant's notice of intent dated June 6, 2012, is the first notice of her injuries by repetitive trauma, oral or written, that claimant provided to respondent. Under K.S.A. 2011 Supp. 44-520(a), claimant failed to give timely notice. This Board Member also finds that even if claimant gave notice of her alleged injuries by repetitive trauma within the time limitations imposed by K.S.A. 2011 Supp. 44-520(a)(1), claimant failed to comply with the requirements of K.S.A. 2011 Supp. 44-520(a)(4).

Because claimant failed to give respondent timely notice, it is unnecessary to make a determination of whether claimant sustained injuries by repetitive trauma arising out of and in the course of her employment with respondent.

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Claimant alleges she sustained an injury by accident on April 26 or 27, 2012, arising out of and in the course of her employment with respondent. Claimant testified she reinjured her back while stretching over the desk to answer the telephone. That is a single traumatic accident and not an injury by repetitive trauma. It is significant that on April 29, 2012, claimant saw Dr. Striebinger for back pain, yet denied a new injury. Based upon the record, this Board Member finds claimant's alleged date of accident was April 27, 2012. Claimant's last day to give notice pursuant to K.S.A. 2011 Supp. 44-520(a) for this claim was May 17, 2012. Claimant failed to prove by a preponderance of the evidence that she gave oral or written notice before then.

Because claimant failed to give respondent timely notice, it is unnecessary to make a determination of whether claimant sustained injuries by accident arising out of and in the course of her employment with respondent. However, respondent's point that claimant merely aggravated a preexisting condition is well taken. K.S.A. 2011 Supp. 44-508(f)(2) provides that an injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic. Claimant testified she reinjured her back on April 26 or 27. There was insufficient evidence to prove the April 27 accident was more than an aggravation of claimant's preexisting back condition.

Based upon the evidence presented, the ALJ concluded claimant presented insufficient evidence in both claims to prove she gave timely notice. This Board Member concurs and makes the following conclusions:

1. In Docket No. 1,061,187, claimant's date of injury by repetitive trauma is April 27, 2012.

2. In Docket No. 1,061,188, claimant's date of accident is April 27, 2012.

3. Claimant failed to give timely notice of her alleged injuries by repetitive trauma in Docket No. 1,061,187 or her alleged injuries by accident in Docket No. 1,061,188.

4. All other issues raised by claimant on appeal are moot.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[6] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[7]

WHEREFORE, the undersigned Board Member affirms the November 27, 2012, preliminary hearing Order entered by ALJ Belden on the issues of timely notice in both claims. In Docket No. 1,061,187, the undersigned Board Member modifies the date of injury by repetitive trauma to April 27, 2012. In Docket No. 1,061,188, the undersigned Board Member modifies the date of accident to April 27, 2012. All other issues are moot.

IT IS SO ORDERED.

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[6] K.S.A. 2011 Supp. 44-534a.

[7] K.S.A. 2011 Supp. 44-555c(k).

Dated this ____ day of March, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Roger D. Fincher, Attorney for Claimant
rdfincher@ksjustice.com; teri@ksjustice.com

Lara Q. Plaisance, Attorney for Respondent and its Insurance Carrier
lplaisance@mvplaw.com; mvpkc@mvplaw.com

William G. Belden, Administrative Law Judge